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IN THE

Supreme Court of the United States

October Term 1977
No. 76-1813

LINDA MARIE THOMPSON,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF THE
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APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal of the appellant herein be dismissed on the grounds that the alleged federal question sought to be reviewed was not timely or properly raised and was not passed on by the Supreme Court of the State of Washington or, in the alternative, moves that the judgment of the Supreme Court of the State of Washington be affirmed on the grounds that this appeal does not present a substantial federal question, the judgment rests on an adequate non-federal basis and the question is so unsubstantial as to not warrant further argument.

I.

STATEMENT

This is a direct appeal from the final order of the Supreme Court of the State of Washington entered March 18, 1977, denying appellant's petition for rehearing of that court's judgment entered January 6, 1977, affirming the judgment of conviction and sentence of the trial court.

At approximately 12:30 a.m., Saturday, February 15, 1975, appellant shot her husband three times, once in the back, once in the side and once in the heart at close range with a .38 caliber pistol she carried in her purse. Both the victim and appellant had been drinking prior to the incident. Appellant claimed she shot her husband in self-defense. Photographs of appellant's claimed injuries were admitted into evidence and medical testimony regarding appellant's condition after the incident was presented. The sole evidence in support of appellant's claim of self-defense was the testimony of appellant.

Appellant was arrested at approximately 1:15 a.m. on Saturday, February 15, 1975, by officers of the Lewis County Sheriff's Office. In the afternoon of the same day, appellant was charged in Lewis County District

Court with the crime of Murder in the Second Degree. Appellant was arraigned, allowed to post $2,000.00 cash bail and released.

On Tuesday, February 18, 1975, the District Court Complaint was superseded by the filing of a Superior Court Information charging the appellant with Murder in the Second Degree. The Information charged the appellant in the alternative with the killing of a human being with design to effect death and while in the commission of a felony, to-wit: Assault in the Second Degree. Appellant was arraigned, pleaded not guilty, and the matter was set for trial by jury for April 1, 1975. Bail was reduced to $1,000.00 cash.

On March 26, 1975, appellant filed a Waiver of (right to) Jury Trial. Appellee did not concur in the trial of the cause without a jury. The court for the reasons states did not consent to the waiver and the matter came on for jury trial April 1, 1975. On that date the appellee filed an Amended Information deleting reference to design to effect death, charging Murder in the Second Degree solely under the lesser felony-murder rule. Notice of intent to file the Amended Information was given to counsel for appellant on March 26, 1975.

On April 3, 1975, the jury returned a verdict of guilty of Murder in the Second Degree. Special verdicts were also returned finding the appellant to have been armed with a firearm and a deadly weapon. By order dated April 29, 1975, the trial court denied appellant's motion for arrest of judgment and/or for new trial. On May 26, 1975, appellant was sentenced to commitment to the Department of Social and Health Services for the maximum term of twenty (20) years.

II.

ARGUMENT

A. Motion to Dismiss

In seeking review of the state court decision below, appellant avers that a substantial federal question is involved. The possibility of a federal constitutional question being involved was first raised by a member of the Washington State Supreme Court during oral argument before that court.

Appellant did not challenge the information or underlying statute on any grounds, let alone federal grounds, before, during or after the trial. Appellant's first challenge, on non-federal question grounds was presented on appeal. From the majority opinion below it is clear that appellant did not timely or properly

raise the alleged federal question.

From the majority opinion below, it is equally clear that the alleged federal question was not passed on by the Supreme Court of the State of Washington. As Justice Dolliver stated in the majority opinion sub nom State vs. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977) at page 17:

> "Both appellant and the courts of other jursidictions consider this to be a matter of statutory interpretation rather than one of constitutional rights.

Appellee submits that substantial grounds for dismissal exist.

B. Motion to Affirm

The primary question presented by this appeal is the right of a sovereign state to enact legislation through its elected legislature defining certain conduct as criminal. In enacting RCW 9.48.040(2) defining felony-murder in the second degree the Washington State Legislature chose to include all felonies not enumerated in the felony-murder in the first degree statute.

In order to convict under this statute, the state must prove that the defendant intentionally assaulted the victim and that as a direct result of such assault the victim died. The Washington courts have held that

the element of specific intent is present in the crime of assault in the second degree. State vs. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968).

Common sense dictates that there is a world of difference between an assault with a firearm resulting in bodily injury and an assault which results in the taking of a human life. At the time of the offense herein, the crime of assault in the second degree was punishable by a statutory maximum term of imprisonment of ten years (RCW 9.11.020), manslaughter committed with a firearm was punishable by a statutory maximum term of imprisonment of twenty years (RCW 9.48.060 and RCW 9.41.025) and murder in the second degree by a maximum term of imprisonment of twenty years to life to be set by the sentencing judge. In the instant case the sentencing judge set the maximum term at twenty years.

Appellant's entire discussion of the potential discretionary charging powers of the prosecuting attorney in fact situations similar to the instant case is totally without merit. In any criminal case the prosecutor is faced with a broad choice of alternatives, but if his oath of office means anything, he will always charge the greatest offense that the facts will support.

A prosecutor interested in shortening his term of office could charge all pre-meditated murders as assault; there is nothing to prohibit such action except the honesty and common sense of most prosecutors. Such far-fetched speculations do not a substantial federal question make.

As the majority opinion below indicates, at least the Maine court has also refused to apply the judicially created device of statutory construction known as the "merger doctrine". State vs. Trott, Maine, 289 A.2d 414, 419 (1972). A careful analysis of the cases of the state's where the "merger doctrine" has been applied clearly indicates that the doctrine was applied as a matter of statutory interpretation and not as a constitutional right. Appellee submits that if application of the felony-murder in the second degree rule as applied to facts such as the instant case is too harsh, it is a matter to be resolved by the Washington State Legislature.

III.

CONCLUSION

Wherefore, appellee respectfully submits that the alleged federal question sought to be reviewed was not properly raised at the state level and clearly was not passed on by the state court, and appellee respectfully moves the court to dismiss the appeal or in the alternative

affirm the judgment entered in this cause by the Supreme Court of Washington on the grounds that the judgment rests on an adequate non-federal basis and the question presented is so unsubstantial as to warrant no further argument.

Respectfully submitted,

Jeremy Randolph

JEREMY R. RANDOLPH
Prosecuting Attorney
for Lewis County, Washington

Counsel for Appellee

CERTIFICATE OF SERVICE

JEREMY RICHARD RANDOLPH, does hereby certify that he is admitted to practice before the United States Supreme Court, and further, on this 22nd day of September, 1977, he did deposit in the United States mails, three true and correct copies of the foregoing Appellee's Motion to Dismiss or Affirm properly addressed, postage pre-paid, to: Linda M. Thompson, Rock and Pine, P. O. Box 58, Centralia, Washington 98531.

Jeremy Richard Randolph

JEREMY RICHARD RANDOLPH